No. 10890

United States
Circuit Court of Appeals
For the Ninth Circuit

BRIAN CONNOLLY and DANIEL CONNOLLY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Brief of Appellant

E. J. McCabe,
S. J. Rigney,
Attorneys for Appellants.

Upon Appeal from the District Court of the United States for the District of Montana.

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JURISDICTION

This is an appeal from a judgment of the District Court of the United States for the District of Montana, Great Falls Division, granting injunctive relief and damages in favor of appellee, in a cause wherein the appellee, United States of America, was plaintiff, and Brian Connolly (also known as Biran Connolly) and Daniel Connolly, two members of the Blackfeet Indian Tribe, residing within the Blackfeet Indian Reservation in Montana, were defendants (R. 46, 51, 79). The judgment, in effect, enjoined the appellants from causing or permitting livestock of the appellants, or of either of them, to enter upon certain particularly described lands located within said Reservation (R. 53), and awarded the appellee a money judgment of $1.00, nominal damages for alleged trespass of defendants' livestock upon said lands, and the further sum of $258.00 by way of a penalty against the defendants under Section 179, Title 25, United States Code (R. 54). The jurisdiction of the United States District Court was predicated upon the fact the United States of America was the plaintiff (R. 2) in that Court (Section 41, Title 28, United States Code Annotated, subd. first).

The appellate jurisdiction of the United States Circuit Court of Appeals is found in Section 225, Title 28, United States Code Annotated (first paragraph, Judicial Code, Section 128, as amended), wherein the Circuit Court of Appeals is given jurisdiction in all cases save those in which there is a direct appeal to

the Supreme Court of the United States. No such direct appeal to the Supreme Court is permissible in this case (section 345, Title 28 U. S. C. A.).

STATEMENT OF THE CASE

The complaint filed November 22, 1941, in the District Court by the appellee, plaintiff below (R. 2-14), substantially alleges that from about August 6, 1941 to November 22, 1941, appellants, citizens of the State of Montana (R. 3) and Blackfeet Indian wards of the United States, and living on the Blackfeet Indian Reservation in Montana (R. 3, 6), "drove, or caused to be driven, drifted and allowed to drift, and herded upon the allotted lands and premises of said Blackfeet Indian Reservation," embracing fourteen and one quarter sections of land, particularly described, and "other lands and premises within the confines" of said reservation (not otherwise described), approximately 260 head of cattle and approximately 75 head of horses, causing said cattle and horses to graze and pasture upon said lands and to eat and destroy the grasses, feed, forage and herbage growing thereon (R. 6, 7) and that the "driving, drifting and herding of said cattle and horses" was done "intentionally, knowingly, willfully, and without consent, and in open difiance of the plaintiff" and without said defendants having any "permit or other right or authority whatsoever" to so do and that defendants "have at all times hereinbefore mentioned ever since have been and now are driving, drifting and herding cattle and horses on and upon said lands

and premises" without the consent of the plaintiff herein, its officers and agents, and without the consent and against the wishes of said Indians of the Blackfeet Indian Reservation" and without paying for the privilege of grazing and herding said cattle upon said allotted lands and premises. It is further alleged that the 260 head of cattle grazed upon said lands from August 6, 1941, to the date of filing the complaint, and damaged the grasses, feed, forage and herbage thereon in the sum of $1,341.00, and that "plaintiff has repeatedly requested" the defendants on divers occasions to remove said cattle from said lands but refused to do so and continue to drive, drift, allow to drift, herd and graze said cattle and horses on said lands. The insolvency of defendants and necessity of multiplicity of suits unless the defendants' acts be enjoined, and difficulty of ascertainment of future damages are alleged and that defendants will continue the acts complained of and will not remove their cattle and horses from the lands unless compelled to do so (R. 6-11). The rated carrying capacity of the range of the Blackfeet Reservation is alleged to be 24 acres for one head of cattle a year and 36 acres for one head of horses, based on a ten months yearly period (R. 11). It is also alleged that plaintiff has no adequate remedy "save in a Court of equity." The complaint prays $1,341.00 actual damages, injunction relief, costs, and for "such other and further relief as to the Court may seem meet and equitable" (R. 11). No suggestion of imposition or

recovery of a penalty against the defendants is made in the complaint.

The complaint expressly admits that defendant Brian Connolly is entitled to graze 255 head of cattle upon 8100 acres of land on the Blackfeet Indian Reservation, particularly described (R. 5, 6).

The answer of Daniel Connolly (R. 22, 23), admitted the allegations of paragraphs I to IV, inclusive, and IX of the complaint, pertaining to the Court's jurisdiction, boundaries of the Blackfeet Reservation, the defendants' residence, citizenship, and membership in Blackfeet Tribe, title in plaintiff and right to possession and control through its wards the Blackfeet Indian Tribe to the lands comprising said reservation, the right of his co-defendant to graze the 8100 acres of land admitted by plaintiff, and the livestock carrying capacity of the land of said reservation (R. 2-6, 11, 22). The answer denied the facts alleged in paragraphs V to VIII, inclusive, and X of the complaint pertaining to alleged acts of trespass, damages, insolvency of defendants, necessity of multiplicity of suits or injunction, and inadequacy of remedy (R. 6-11, 22).

The amended answer of Brian Connolly admitted the allegations of paragraphs I to III, IV and IX of the complaint pertaining to the Court's jurisdiction, defendants' citizenship, residence, membership in Blackfeet Tribe, and right of said defendant to graze land described in paragraph IV (R. 2-6, 11, 23, 24), and alleges he had grazing privileges on additional

lands (R. 24).

Paragraphs V to VIII, inclusive, and IX of the complaint substantially alleging trespass of cattle of defendants, damages, refusal of defendants to remove their livestock, continuity and future trespass, insolvency of defendants, necessity of multiplicity of suits or injunction, irreparable damage, and nonexistence of remedy save in a court of equity (R. pp. 6-11) are either specifically denied or by qualified admissions and general denials are in effect denied by Brian Connolly (R. 23-26, 27). The cattle and horse carrying capacity of the range on the Blackfeet Reservation of 24 acres for one head of cattle and 36 acres for one horse based on a ten month yearly period alleged is admitted by Brian Connolly (R.11,26).

The amended answer of Brian Connolly, as originally filed also pleaded three affirmative defenses, to-wit:

1. That he had an "on and off" written grazing permit and agreement entered into between plaintiff and Fred Choquette and appellant, for a term of from November 1, 1940 to April 30, 1943, whereby he had the right to graze 5780 acres of land and described in paragraph IV of plaintiff's complaint and that said agreement contemplated a grazing period of twelve months during each year, and that it had been the recognized custom and practice for more than twenty years between the plaintiff and by the permittees of the plaintiff grazing livestock on said reservation that permittees, in lieu of grazing livestock upon the

lands during a continuous twelve months period of the maximum number of livestock specified, had the absolute right to graze a greater number of livestock for a shorter period, such right of increase to be computed by adding to the number specified in the agreement proportionately and accordingly as the period of actual grazing bore to the total period of twelve months. That said Connolly had the right to graze a total of 510 head of livestock for a six month period on the lands described in the permit and at no time did he actually graze on said permit lands more than 309 head and at no time did he graze an excess of 255 head of cattle or the equivalent as above set forth on said permit land (R. 27-29). This permit appears as "Plaintiff's Exhibit No. 1" on pages 89-121 of the transcript of the record. In addition to said permit lands the answer alleges he had other lands in his possession and control for pasturing and grazing livestock and that if at any time livestock in the possession or control of Brian Connolly grazed, or pastured, or drifted, or were herded upon the lands complained of in the complaint same was done without knowledge of defendant, and in any event the number did not exceed the number he was entitled to graze (R. 29).

2. That the lands described in paragraphs IV and V are open unfenced lands chiefly suitable for grazing livestock and that Brian Connolly had the vested right in common with all members of the Blackfeet Indian Tribe to permit cattle, horses and other live-

stock owned individually by members of the tribe to roam at large and graze upon all unfenced lands situate within the Blackfeet Reservation, and that such right was recognized by plaintiff and accorded the Blackfeet Tribe by treaty in the year 1855. That during all of the period from the time of making said treaty the said tribe have believed and interpreted such treaty as conferring such rights upon the members of the tribe and have accordingly exercised such right with the knowledge and consent of the plaintiff and the tribe and such members are still exercising such rights with full knowledge and acquiescence of the plaintiff, and that the institution of the present action is the first time that such right has ever been attempted to be denied to a member of that tribe (R. 29, 30).

3. That from time immemorial there has existed among the Indians of the Blackfeet Tribe the long and well established custom of each member of the tribe having the absolute vested right of allowing livestock owned by such member to roam at large and graze upon the lands to which the tribe claimed the right of occupancy without interference by the tribe or members thereof, and that such custom has been observed by the tribe as one of the laws of the tribe binding upon the members of the tribe collective and individually. That as a member of the tribe he is entitled to permit his livestock to range upon the "unfenced lands" to which the tribe claimed rights of occupancy and such right is a valuable incorporeal right in Brian Connolly and the exercise of which is guar-

anteed to him under the constitution, treaties, and laws of the United States (R. 30, 31).

The plaintiff moved to strike from the amended answer, as immaterial and redundant, all of the portion of paragraph I of Brian Connolly's further answer to the complaint relating to the custom and practice of plaintiff and permittees, under permits of the character described, to increase number of stock grazed proportionate to the reduction of period of time of actual grazing, and relating to his grazing of livestock under his permit (R. 32, 33); moved to strike all of the matters in paragraphs II and III of said defendant's further answer relating to his right of grazing and pasturage under the treaty of 1855 between plaintiff and the Blackfeet Tribe and the exercise of such treaty right at all times since by members of the tribe with the knowledge, acquiescence and consent of plaintiff and the present action being the first time a denial of such right has been attempted (R. 29, 30, 33). The plaintiff also moved to strike as redundant, immaterial and impertinent all of the matter appearing in paragraph I of the third affirmative defense of Brian Connolly's amended answer relating to the custom of the Blackfeet Tribe, recognized as law by that tribe, to permit individually owned livestock of tribal members to range upon the open unfenced land to which it claimed the right of occupancy (R. 31, 33).

The District Court granted plaintiff's motion to

strike in its entirety (R. 34). At the trial Brian Connolly endeavored to testify relative to the custom among the Blackfeet Indians running their stock at large on the Blackfeet Indian Reservation and the Court refused admission of such evidence on the ground that such custom was not in issue by reason of the plaintiff's motion to strike allegations respecting same from the Brian Connolly answer having been sustained by the Court (R. 263).

Trial of the cause was had before the Court without a jury and submitted to the Court for decision (R. p. 85—362). The evidence received and rulings of the trial court on admission of evidence will be discussed fully in that portion of the within brief devoted to argument of the various legal questions presented to this Court.

Thereafter the trial court filed written decision (R. 39-44), to the effect that plaintiff was entitled to recover a penalty of $258.00 under Section 179 of Title 25, United States Code Annotated, the further sum of $1.00 nominal damages only, and injunctive relief. Findings of fact and conclusions of law in favor of the plaintiff were given (R. 45-51), and judgment rendered in favor of plaintiff and against **both defendants** for the sum of $258.00 penalty under Section 179, 25 U. S. C. A., and a permanent injunction (R. 51-55).

The appellants moved, separately, for new trials (R. 57-70). The motions for a new trial were denied

(R. 78, 79), and appeal taken (R. 79-85).

QUESTIONS PRESENTED

The questions presented in this appeal may be briefly stated as follows:

First. Did Brian Connolly and Daniel Connolly willfully cause or permit their cattle to unlawfully enter and graze upon land allotted to Indian allottees within the Blackfeet Reservation?

Second. Was the trial court's judgment for recovery by plaintiff of the penalty of $258.00 warranted or proper in this action?

Third. Was the judgment of the trial court allowing permanent injunctive relief against defendants proper in this cause?

Fourth. Was the evidence received during the trial in the lower court sufficient to support the findings of fact, conclusions of law and judgment of the District Court?

Fifth. Was the action of the trial court proper in granting appellee's motion to strike the specified allegations of fact of the amended answer of appellant Brian Connolly objected to by appellee?

Sixth. Was offered evidence of defendant concerning the custom among the Blackfeet Indians relative to running their stock at large on the reservation correctly excluded by the trial court?

Seventh. Was the redirect examination by witness Brian Connolly unduly restricted by refusal of the trial court to permit him to be examined for the

purpose of showing that a purported resolution of the Blackfeet Tribal Council relative to free grazing on the Blackfeet Reservation (Plaintiff's Ex. 11, R. 264-268), introduced in evidence as a part of the cross examination of the witness, had not been adopted by said tribal council and was not a valid resolution of such council?

SPECIFICATIONS OF ERROR

1. Because there was no sufficient evidence in the record, the trial court erred in making findings of fact No. IV (R. 46, 47), as follows:

"That for many months prior to and including the date of the filing of the plaintiff's complaint, the defendants, Brian Connolly and Daniel Connolly, willfully drove and otherwise conveyed livestock of horses and cattle and willfully caused and allowed their said livestock to range and feed on lands and premises belonging to their Indian neighbors on said Blackfeet Indian Reservation and to trespass on the lands of their said Indian neighbors on said Blackfeet Indian Reservation, without the consent of said Indians, and in open defiance of the plaintiff, its officers and agents, and without said defendants ever having had at any said time any permit or other right or authority whatsoever to drive and herd, or otherwise convey, said livestock of said defendants on and upon the Blackfeet Indian Reservation."

2. Because there was no sufficient evidence in the record and because there was no foundation in the

pleadings for same the trial court erred in making finding of fact No. V (R. 47) as follows:

> "That the defendants are subject to the penalty provided for by Section 179, Title 25, United States Code, in the amount of $1.00 per head for the livestock of said defendants that said defendants drove and conveyed to range and feed on the lands and premises belonging to their Indian neighbors on said Blackfeet Indian Reservation without the consent of said Indians, as follows, to-wit: the 25 head of horses in willfull trespass on July 25, 1941, the 48 head of horses and 45 head of cattle in willfull trespass on August 8, 1941, the 32 head of horses in such trespass on Angust 13, 1941, and the 36 head of horses and 22 head of cattle in willfull trespass on October 21, 1941—making the total penal sum of $258.00."

3. Because there was insufficient evidence in the record the trial court erred in making finding of fact No. VI (R. 48) as follows:

> "That it is true that the defendants, Brian Connolly and Daniel Connolly, one and both, willfully refused to remove their trespassing cattle and horses from the lands and premises of their Indian neighbors on said Blackfeet Indian Reservation, and said defendants willfully continued to allow their said livestock to trespass upon said lands and premises, and said defendants permitted their said livestock to eat and destroy the grasses, feed, herbage and other forage growing thereon, and to trample and destroy the same, and said defendants, one and both, refused to remove their said livestock when requested and upon the instructions of authorized officers of the United States Indian Service, when injury was being done to the range of said Blackfeet Indian Reservation, by

reason of the improper handling of said livestock by said defendants, and said defendants would not remove their said livestock from said Indian lands and premises of said Blackfeet Indian Reservation until compelled so to do."

4. Because there was insufficient evidence in the record the trial court erred in making finding of fact No. VII (R. 48) as follows:

"That the plaintiff, by reason of the foregoing, has no plain, adequate and complete remedy at law herein against the repeated trespassing of the defendants and no remedy whatsoever, save on the equity said of this Court, where such willful trespasses are cognizable."

5. The trial court erred in making that part of fact No III (R. 46) to the effect that the lands and premises on the Blackfeet Indian Reservation upon which Brian Connolly had grazing rights and privileges were in no wise involved in or made the subject of the action for the reasons that said part of the finding is contrary to the pleadings and the evidence.

6. Because of the insufficiency of the evidence and lack of proper pleading to support same the trial court erred in the court's conclusions of law Nos. 1, 2, 3 and 4, to the effect that plaintiff is entitled to judgment for the penalty provided by Section 179, Title 25, United States Code, nominal damages, plaintiff's costs and a perpetual injunction against the defendants (R. 49, 50).

7. Because there was no sufficient evidence in the record the trial court erred in rendering and enter-

ing judgment in favor of the plaintiff and against the defendants (R. 51-55).

8. The trial court erred in granting the motion of plaintiff to strike the allegations of the amended answer of Brian Connolly pertaining to the custom and practice of the plaintiff and grazing permittees upon lands on the Blackfeet Indian Reservation to increase the number of livestock grazed upon permit land proportionately as the trial grazing period was reduced by the permittee (R. 27, 28, 32, 34).

9. The trial court erred in granting plaintiff's motion to strike the allegations of the amended answer of defendant Brian Connolly relating to his rights as a member of the Blackfeet Tribe to permit livestock to roam at large and graze upon unfenced lands situate within the Blackfeet Indian Reservation by virtue of the treaty of 1855 between the United States and the Blackfeet Indian Tribe and the exercise of such rights by members of said tribe at all times since with the full knowledge of the plaintiff (R. 30, 33, 34).

10. The trial court erred in granting plaintiff's motion to strike from the amended answer of Brian Connolly the allegations pertaining to the long and well established custom of the Blackfeet Tribe of members of that tribe having the vested right to allow individually owned livestock to roam at large and graze upon unfenced lands to which the Blackfeet Tribe had the right of occupancy (R. 31, 33, 34).

11. The trial court erred in refusing to permit witness Brian Connolly testify to a custom of the Blackfeet Indians relative to running their livestock at large on the Blackfeet Indian Reservation (R. 263) as follows:

Q. Do you know whether or not there has been a custom among the Blackfeet Indians on the Blackfeet Reservation relative to running their stock at large on that Reservation?

> Mr. Allan: Again renewing the objection. We object to any testimony as to custom because the matter is now covered by regulations.
>
> The Court: I don't think that is an issue here. I think we threshed that out on your motion to strike.
>
> Mr. Allan: Yes, on my motion to strike."

12. The trial court erred by restricting the redirect examination of witness Brian Connolly with reference to a purported copy of a resolution of the Blackfeet Indian Tribal Council introduced in evidence as "Plaintiff's Exhibit No. 11" during cross examination of the witness (R. 264-269), when on redirect examination counsel for defendants sought to examine him with reference to said resolution (R. 287) as follows:

> "Q. Now, you have been examined on cross examination about a resolution relative to free grazing on the Blackfeet Indian Reservation. Will you please state whether or not that resolution, whether it passed or not, has been a subject of discussion with the Blackfeet Tribal Council?
>
> A. Yes sir.

Mr. Allan: We object to such resolution. The resolution speaks for itself, and it is the best evidence.

The Court: Well, I think so. The resolution was passed first, and was revoked.

Mr. McCabe: We are going to show there was a dispute with some members of the Council; it was never adopted, and some said it was, and in order to obviate that question there was a resolution introduced repealing that resolution.

The Court: Objection sustained as the matter is going into the proceedings of the Council."

13. The trial court erred in denying the motion of Brian Connolly for a new trial (R. 57-65, 78, 79).

14. The trial court erred in denying the motion of Daniel Connolly for a new trial (R. 65-70, 78, 79).

ARGUMENT

Summary.

The argument herein may be abridged to the following legal propositions:

(a) The evidence of plaintiff failed to establish a willful intentional or a willful permissive continuous trespass of defendants' livestock upon the lands described in the complaint and failed to establish any damages, or insolvency of defendants or right to injunctive relief, all material allegations of the complaint, and consequently there was a fatal failure of proof.

(b) The imposition of a judgment for a penalty for alleged trespassing livestock was without any supporting pleading or evidence and contrary to the rule that a court in giving relief of an equitable char-

acter will not enforce a punitory penalty.

(c) The striking of the trial court of allegations of treaty rights of defendant and allegations of long established custom of the Blackfeet Indians as to straying and roaming of livestock on unfenced tribal lands and denial of admission of evidence thereof by defendants, in effect, deprived them of substantial vested property rights as members of the Blackfeet Indian Tribe.

(d) The Blackfeet Tribe having adopted a law requiring a driving or herding of livestock upon unfenced or cultivated land to constitute an actionable trespass controls the case at bar by reason of their being no Federal legislation other than Section 179, Title 25 U.S.C.A., which section is not applicable in this action.

(e) The Wheeler-Howard Act of June 18, 1934, does not abrogate the powers of the Blackfeet Tribe nor does it confer upon the Secretary of the Interior the congressional power of legislation to define trespass of livestock nor fix a penalty nor set aside or annul the tribal laws and customs as between members of that tribe.

(f) The trial court unduly and prejudicially restricted cross examination on behalf of defendants.

(g) The effect of the money judgment for the statutory penalty was to deprive defendant Brian Connolly of his right to have that issue submitted to a jury.

1. The evidence was and is insufficient to sustain the judgment.

The substance of plaintiff's complaint is that the defendants willfully drove or caused or permitted approximately 260 head of cattle and 75 head of horses owned by them to enter and graze upon 15 sections and an additional 40 acre tract of "allotted lands and premises" particularly described as to section, range and township numbers and upon "other lands and premises" not particularly described, for the continuous period of time from about August 6, 1941, to and including November 22, 1941 (date of filing complaint), and would continue to so do; that repeated demands made by plaintiff for the removal of said livestock had been refused by defendants; that said defendants were insolvent, that actual damages of $1341.00 had been suffered by plaintiff and absence of adequate remedy "save in a court of equity" (R. 2-12). We respectfully direct the attention of the Court to enormity and extent of the trespass charged as against the deadly parallel presented by the meager and unsatisfactory character of the evidence presented by plaintiff at the trial. Summarizing the evidence as to livestock of the defendants being willfully and knowingly caused to be driven or willfully and knowingly permitted to drift and be driven upon more than 15 sections of land and the actual damages sustained and the necessity of the intervention of a court of

equity to remedy the alleged wrongs, the evidence wholly fails to sustain the allegations of the complaint, as will clearly appear from a consideration of plaintiff's evidence.

Plaintiff's witness Stephenson testifying as to only one observation of either of defendants' livestock possibly being on allotted land, prior to filing the complaint, testified that on October 21, 1941, in company with a Mr. Girard and a Mr. Barrett he saw 36 head of horses in section 11, township 35 North, range 9 West, and saw no cattle on that day (R. 122, 123). Apparently he failed to examine the brands as he did not state same. Plaintiff's witness Barrett testifying as to this occasion said it was on October 24, 1941, and that they saw 36 head of cattle branded PY (Brian Connolly's brand) and part branded AX (Daniel Connolly brand) but did not state the number bearing each brand (R. 161). Mr. Girard, the other witness of plaintiff, as to this occasion testified the date was October 21, 1941, and that he saw 36 head of cattle branded PY and AX, but apparently did not know upon what or whose land or allotment same were at the time as he failed to identify the location (R. 150, 151).

The following is the only other evidence as to times livestock of either defendant possibly **being on allotted Indian land.** Plaintiff's witness Barrett stated he and a Mr. Girard on July 24, 1941, observed 25 head of horses branded PY (Brian Con-

nolly's brand) on allotted land in the one section, 21-35 North, range 9 West only (R. 162). Witness Girard testified on this date he saw 25 head of horses in the two sections 20 and 21, township 35 North, range 9, but apparently did not observe whether they bore the brand of either defendant and he did not testify whether they were located on allotted land or not (R. 150). Girard also testified to 25 head of cattle on August 6, 1941, in sections 11 and 14, 35 North, range 9 West (R. 150).

In brief the only evidence of cattle or horses of either defendants being on allotted Indian land was a total of 36 head of mixed PY and AX livestock, uncertain whether horses or cattle and as to number of each, on October 21, 1941, on one section only, 25 head of horses bearing PY (Brian Connolly brand) being on one or at most scattered over two sections and 25 head of cattle of "Connolly Cattle" scattered (apparently) in two sections, and without identification as to brand on cattle or whether Brian Connolly's or Daniel Connolly's.

As to plaintiff's evidence of defendants' livestock observed on other land prior to filing the complaint, the record discloses the following:

Plaintiff's witness Girard stated on August 6, 1941, he and a Mr. Wershing (at time of trial in Army service) saw 28 head of horses branded PY (Brian Connolly brand) in sections 3 and 10, township 34 North, range 9 West, and 20 head of horses scattered

(apparently) over six sections of land in township 35 North, range 10 West, and 25 head of cattle in sections 11 and 14, township 35 North, range 9 (R. 149, 150). The witness did not identify the ownership of the cattle or brands thereon, and what brands they bore or the respective numbers owned by Brian Connolly or by Daniel Connolly is left to conjecture.

Plaintiff's witness Barrett testified he and Mr. Girard on August 8, 1941, counted 2 head of cattle on section 22 - 34 - 9, 23 head of cattle on sections 16 and 21 - 35 - 9, and 25 head of horses on section 11 - 35 - 9. The witness did not identify any of these as either being owned by or bearing the brands of either of the defendants (R. 158). Mr. Girard evidently had no recollection of this occasion as he failed to corroborate the testimony of Mr. Barrett notwithstanding he was called as a witness for plaintiff (R. 148-156).

Witness Barrett also stated that he and Darrell Young on August 13, 1941, saw 32 head of horses branded PY (Brian Connolly brand) on the South half of section 11 - 35 - 9 (R. 160). Plaintiff's witness Darrell Young, referring to the incident, stated the 32 head were on sections 1 and 13 - 35 North, range 9 West.

On none of the occasions testified to by plaintiff's witnesses were either Brian Connolly or Daniel Connolly or any agent of either defendant seen driving or herding any of the cattle or horses, or seen in the

vicinity of same, nor was there any evidence as to length of time the horses or cattle remained on the land where seen. Furthermore plaintiff's complaint admits that Brian Connolly had the right to graze approximately 8,000 acres of land in proximity of the places where the witnesses saw the cattle and horses, and there is no suggestion that this land was overstocked by the defendants. In fact, the evidence showed that the Connollys had a large excess of range land over their requirements on the basis of 24 acres for each head of cattle and 36 acres for each horse.

As against the complaints charge of a knowingly, willful continuous herding and drifting of approximately 260 head of cattle and 75 head of horses from August 6, 1941, to November 22, 1941, over an area of more than 15 sections of land the plaintiff's evidence possibly shows, if discrepancies in the testimony are ignored, the following isolated times and numbers of livestock of the Connolly's being seen off of their lands, to wit:

July 24, 1941, 25 Brian Connolly horses scattered on 2 sections,

August 6, 1941, 48 Brian Connolly horses scattered on 8 sections,

August 8, 1941, 25 cattle, 25 horses (not identified as Connollys',

August 13, 1941, 32 Brian Connolly horses on 1 or 2 sections,

October 21 or 24, 1941, 36 head horses, mixed defendants' brands, according to Mr. Stephenson, but 36 head cattle according to Messrs. Barrett and Girard.

The horses seen on August 8, 1941, not being identified as to ownership, must be eliminated, leaving July 24, August 6, and August 13, with a total of 105 horses of Brian Connolly's PY brand, and on October 21st or 24th 36 head of horses or cattle (which uncertain) bearing PY and AX brands, but number of each not given.

The following is a resume of the plaintiff's evidence as to times livestock observed after the filing of the complaint offered to indicate a possible willful intent to continue alleged trespassing by defendants' livestock.

Plaintiff's witness Stephenson stated he, in company with Mr. Girard, on Jan. 16, 1942, saw 78 head of cattle in section 2, township 34 North, range 9 West, land adjoining Brian Connolly's grazing permit in Unit 12, but did not identify them as belonging to either of the defendants, either by brand or ownership (R. 124). Mr. Girard, plaintiff's witness, apparently had no recollection of this incident as he failed to support Mr. Stephenson's testimony (R. 148-156, 358).

Stephenson further stated that on Jan. 28, 1942, with Mr. Girard, he saw 22 head of cattle belonging to "Mr. Connolly (we assume he meant the father of

Daniel Connolly) on sections 3 and 4, township 34 North, range 9 West (this land immediately adjoins Brian Connolly's permit land in Unit 12) (R. 123). Again Mr. Girard (plaintiff's witness) apparently had no recollection of this incident as he made no mention of same.

Witness Stephenson also stated he, and witness Girard, on Monday of the week of the trial (this would be May 3, 1943, as trial was May 6, 1943, R. 85), he saw 7 head of "Mr. Connolly's horses in section 16, township 34 North, range 9 West, and 3 of his cows and 9 head of his horses in section 18, township 35 North, range 10 West (R. 124). Again we find Mr. Girard's memory apparently lacking as to an incident occurring only three days prior to the trial as he failed to mention same.

The witness Stephenson testified further that on January 27, 1942, he, in company with plaintiff's witness Barrett, saw 8 head of horses "on Connolly's" (we assume he meant of Connolly's) in section 10, township 34 North, range 9 West, and 18 head of cattle (not identifying ownership) in section 4, township 34 North, range 9 West (R. 123, 124). Again we are confronted with an apparent loss of memory of a witness for plaintiff, as Mr. Barrett failed to make any mention of this incident (R. 157-164).

With the exception of the incident of May 3, 1943, it is to be noted that the livestock seen since the fil-

ing of the complaint were observed on sections adjoining Brian Connolly's land on the South in January in the heart of the Winter when cattle will naturally drift southward.

Neither of the defendants were observed driving or herding the horses or cattle and apparently from October 22, 1941, to January 28, 1942, and from the latter date until May 3, 1943 no Connolly cattle were observed off of land which they owned or had grazing permits upon.

Further, the record fails to show a single incident when either of the defendants failed to remove thir livestock from any land when their attention was directed to same. A further circumstance showing want of any intentional trespass is that during all of the time alleged in the complaint when alleged large droves of cattle were being driven, herded and drifted by the defendants, no complaint was ever made by neighbors or persons having grazing rights adjoining the Connolly land (R. 142).

No actual damage was shown by plaintiff to either grass or roots or herbage although an alleged actual damage of $1341.00 was alleged (R.9).

Ignoring the conflicts in the testimony of the plaintiff's witnesses and the lack of supporting testimony by other witnesses present at the time of occurrence of the facts testified to and placing the plaintiff's case in its strongest aspect, we find four separate occasions in which livestock of one or both of defendants were observed on certain land either not

owned by defendants or upon which they had no written grazing permits prior to the filing of the complaint and four separate occasions (three in the midst of Winter) during a perior of about eighteen months after complaint filed and before the trial.

The evidence presents a case of where livestock following its characteristic to stray leaves its range without knowledge of the owner and without intent in him to trespass.

There is not a scintilla of evidence showing the Connollys at any time drove or otherwise conveyed livestock to feed or range on Indian land, either allotted or tribal, nor is there any evidence to show an over-stocking of the Connolly range.

The plaintiff's own evidence establishes that there was no continuous trespass as the plaintiff's witnesses did not remain to determine how long the stock was off the Connolly land or when or what steps were taken by the Connollys to return the stock.

The department recognized the natural characteristic of livestock to stray and as Mr. Stephenson stated such straying is not deemed a trespass where lands are unfenced and the owner is diligent in returning the animals (R. 139). Diligence presupposes knowledge and at no time is it shown that defendants failed to return their livestock from other land to their own land when they discovered same had strayed.

The defendants were never notified by any of the witnesses to the fact that the stock they claimed to have seen were off defendants' range. Information

came on one or two occasions only by letter and the Connollys took immediate steps to return their livestock (R. 248-251). In fact, the evidence is uncontradicted that the defendants and the Connolly children were instructed to keep their livestock on their own range and water and rode daily to turn back straying livestock (R. 245, 246, 290, 295, 297).

Offsetting the plaintiff's case we have the following uncontradicted evidence on behalf of defendants. Brian Connolly, father of co-defendant Daniel Connolly, had, according to witness Stephenson, a total grazing right to between 9,000 and 10,000 acres of land (R. 129, 130). The written exhibits show he had 8395 acres of land on which to graze livestock (R. 89-121, 187-190, 191-208, 210-219, 220-243), and in addition thereto 280 acres from Clara Hanson (R. 183), and there is considerable evidence as to grass paid for direct to the allottee, Joe Kipp, by Brian Connolly (R. 279, 281) about 1120 acres.

The complaint alleges and answer admits 24 acres for cow and 36 acres for a horse required (R. 11).

Computing, we find that Connollys needed for their operations as follows: 3120 acres for his cattle at 130 head, or 2860 acres if computed at 140 head; 2150 acres for 75 horses, computed at 30 acres per horse, or 3000 acres for 100 head, 2700 acres if computed at 36 acres for 75 horses, or 3600 acres if computed at 100 head at 36 acres per head (R. 181, 182). Stephenson testified that calves under six months were not counted, and colts take the same status,

which would lessen the required acreage in proportion to the colts and calves, but taking the highest figures and we have 3360 acres for cattle and 3600 acres for horses or a total of 6960 acres for all of the Connolly livestock. From this it conclusively appears that Connollys were not over-stocking the range at any time and were paying for all of the grass that their stock could possibly use.

This discussion brings us to a consideration of the cattle that Connolly ran for other people in 1941. It was testified that he had 42 to 45 head of Payne cattle either in 1941 or 1942, the government witness could not remember which year (R. 152), but even so, this would not require more than 1080 acres, which would still leave Connolly with an excess of one thousand seven hundred fifty five acres of land above his total requirements.

The area involved in the evidence and upon which stock of the defendants were observed to graze was and is open unfenced lands (R. 248, 291-293).

In view of the foregoing the irresistible conclusion reasonably must follow that the weight of the evidence decisively preponderates against any actionable trespass warranting either damages, nominal or otherwise, and against the grant of the extraordinary remedy by way of injunction.

Before concluding this part of the brief we shall briefly allude to the money judgment against both of the defendants for the penalty of $258.00. The evidence of plaintiff shows definitely an actual total

of only 105 head of cattle owned by Brian Connolly seen off of his land and 36 head of mixed livestock bearing the respective brands of both defendants without a specification of number of each. Clearly, Daniel Connolly may not be penalized for the stock owned by his father or Brian Connolly for that of his son. The trial court nevertheless imposed a penalty of $258.00 when the total number of all cattle identified could not be penalized in excess of $1.00 a head under the statute, or a total of $105.00.

Thus the court erred in making findings of fact Nos. **IV, V, VI, VII** (R. 47, 48, **specifications of error** 1, 2, 3 and 4 supra), and rendering judgment against the defendants (R. 51-55, specifications of error 7 supra).

The impropriety of imposing the statutory penalty, as a matter of law under section 179, Title 25 U.S.C. or the penalty under section 71.2 of Title 25, Code of Federal Regulations, will be considered in the following subdivision of this brief.

2. **Penalty imposed under section 179, Title 25, United States Code.**

Section 179 of Title 25 U.S.C. provides substantially that if any person **shall drive, or otherwise convey any stock of horses, mules, or cattle to range and feed on any land belonging to any Indian or Indian Tribe, without the consent of such tribe,** such person **shall forfeit the sum of one dollar for each animal of such stock** (emphasis ours).

There is not one iota of evidence showing the de-

fendants, or either of them, at any time drove or conveyed livestock to range or feed on any land belonging to any Indian or Indian tribe. The statute clearly applies to a willful and intentional trespass, and since it involves a forfeiture by way of money penalty same should be strictly construed.

The allegations of the complaint and prayer for relief by way of injunction and actual damages presents a case wherein equitable relief is sought, not punishment of defendants. In fact paragraph X of the complaint alleges that plaintiff is seeking a remedy "in a court of equity where matters such as those hereinabove set forth are cognizable." No suggestion of recovery of a penalty under the above penal statute is intimated.

Undoubtedly the plaintiff in framing the complaint had under consideration the decision of this Circuit Court of Appeals in the case of Ash Sheep Company v. The United States 229 Federal Reporter 479, affirmed 250 Federal Reporter 591, wherein this court held in granting equitable relief, which was the principal relief sought in the cause at bar (temporary and permanent injunction), the court would not aid in the collection of a penalty provided by the foregoing section 179 of 25 U.S.C.

Independent of the provisions of Section 81 of the Federal Rules of Civil Procedure, and even under the provisions of Rule 2 of the Rules of Civil Procedure, providing for one form of action, the authorities agree that in administering equitable relief the court

will observe the rules theretofore observed by courts of equity in granting such relief.

Schwindt v. Lane Potter Lumber Company, 40 Mont. 537, 107 Pac. 818,

See also discussion of Rule 2 and quotation from the authorities appearing in Vol. I Federal Rules of Civil Procedure, pp. 62-65, and 75-79,

1 Bancrofts Code Practice & Remedies, Section 171, p. 257.

In Samuell vs. Moore Mercantile Co., 62 Mont. 232, 204 Pac. 376, the court, in construing a code provision of Montana identical with Rule 2 of the Federal Rules of Civil Procedure, said: "though the form and the name of the action is abolished, the distinctions between the character of different actions necessarily arise from the nature of the wrong which is suffered and the relief which is sought, so that a reference to the forms and principles of common law pleading is frequently of aid in determining the rights and remedies of litigants." Notwithstanding the foregoing rules, and the fact that there was no evidence to show any number of livestock owned by defendant Daniel Connolly upon which to base a penalty and in face of the evidence showing a total of 105 head of Brian Connolly stock on certain land, the court found (R. 47) that the defendants were both liable for a penalty of $258.00 and rendered judgment for such sum (R. 54).

It is true the District Court found as a fact that

both defendants had "willfully refused to remove their trespassing cattle and horses from the lands and premises of their Indian neighbors" and continued to allow their livestock to trespass and destroy the grasses, feed, etc., growing thereon and refused to remove same when rquested by officers of the Indian Service (R. 48), but this finding is clearly without sufficient evidence to support same. There is no testimony of a request for removal, either written or verbal, of any trespassing cattle and a refusal by either of the defendants to remove same. Witness Stephenson stated substantially that he had a conversation with "Mr. Connolly" (apparently Brian Connolly) about restricting his cattle in the future as he was there to enforce the rules and regulations of the Indian Department (R. 146), and Mr. Connolly told him "that those were Indian stock, that they could run anywhere on the Reservation that he wanted them to" (R. 147). Brian Connolly, referring to Mr. Stephenson's testimony, said he did not make the statement as testified to by Mr. Stephenson. His statement was that "we had a right to run for our own family where there is no fence" (R. 260). He further explained to Mr. Stephenson what he meant by his statement was stock that accidentally strayed off the unit onto adjoining land where unfenced. This appears when the testimony of witness Connolly is examined (R. 260).

> "Q. This morning Mr. Stephenson testified that he had a conversation with you at one time

wherein you substantially notified him, or informed him that you could drive your livestock any place you wanted to on the Reservation. Do you recall him so testifying this morning?

A. I do.

Q. Did you make that statement to Mr. Stephenson at any time?

A. I didn't make any part of that.

Q. What was the statement you made to him at that time?

A. That we had a right to run for our own family where there is no fence.

Q. Did you make any complaint as to stock that was accidentally strayed off the Unit on the adjoining lands, or what did you say at that time?

A. I tried to explain to him about it, it couldn't be helped to keep them off; it was impossible to keep them off.

Q. That was the substance of your statement?

A. Yes." (Emphasis ours.)

The Court will observe how witness Connolly explained how it was impossible to keep cattle from straying onto unfenced land. Mr. Stephenson did not in rebuttal deny that witness Connolly made such explanatory statement (R. 357). No evidence appears of a single instance of a notification of any trespassing stock to Connollys and their refusal or failure to return same to their land.

Opposed to the statement of Stephenson is the evidence of the instructions given by Brian Connolly to

Daniel and his other sons to ride every morning for stray stock and turn them back on their own range and the following of such instructions by the father and the sons (R. 260, 248, 250, 288- 291, 295, 296), and the testimony of Brian Connolly that when he received the three letters about some of his stock being off his range he went out and removed same (R. 248-251).

The trial court's finding of fact No. VII (R. 48, specification 5 supra), is to the effect that the lands and premises upon which Brian Connolly had grazing rights were in no wise involved in this action. This is clearly erroneous. The Connolly family, including Daniel Connolly, had certain land they owned in Unit 12 and other land, and they had grazing rights in that unit and on other land (R. 102, 89-121, 7). Adjoining were large areas of unfenced land. The natural characteristic of livestock to stray was known to plaintiff and its officers and even under plaintiff's interpretation of the law and regulations it was the policy of plaintiff not to deem straying stock as a trespass if the owner is diligent in his efforts to return them (R. 139). The entire evidence in this case shows that the livestock involved were stray stock only and that defendants were diligent in their efforts to return them to their own lands. If Connollys had no land and merely willfully drove and herded livestock onto the lands of their negihbors a different question would be involved.

The trial court found that the defendants and each

of them were Indian persons, wards of the government of the United States and under the charge of the Superintendent of the Blackfeet Indian Reservation in the state of Montana (R. 46). The penal statute, section 179 Title 25 U.S.C.A., was originally passed by act of Congress in 1796 and was then entitled as follows: "AN ACT TO REGULATE TRADE AND INTERCOURSE WITH THE INDIAN TRIBES, AND TO PRESERVE PEACE ON THE FRONTIERS." 1 Stat. 469, 470 (1796).

The foregoing section was re-enacted without change in 1802. 2 Stat. 139, 141.

Ash Sheep Co. v. U.S. 40 S. Ct. 241, 252 U.S. 259.

In 1834 (Act of June 30, 1834, c. 161, Sec. 9, 4 Stat. 729, 730) it was given its present form, which also was carried into the revised statutes without change in the wording, Rev. Stats. 2117.

It will be noted this statute was almost 150 years old at the time this action was commenced against these Appellants. It will be observed also that the title of the statute makes no reference whatever to trespasses by Indians on their own reservation; it appears to be the intent and purpose of the statute as originally enacted to protect Indian tribes in their trade and intercourse with outsiders and to protect the peace of the frontiers.

It will be further noted that even though this section of the statute applied to individual Indians at the time it was enacted, the United States had no jurisdiction at the time over the Blackfeet Tribe of Indians.

The Treaty of 1855 is the first record we have of any matter involving the Blackfeet Tribe. Examining the Treaty of 1855 with the Blackfeet Indian Tribe and other tribes Art. 3 thereof provides in part as follows:

> "Where all nations, tribes and bands of Indians, party to the treaty, may enjoy equal and uninterrupted privileges of hunting, fishing, gathering fruit, grazing animals, curing meat and dressing robes."

The foregoing provision when read with article 4 of the treaty makes the lands on the Blackfeet Indian Reservation common ground to all these Indians as affects their right to graze animals within the confines of this reservation. The right to graze animals is exclusive and section 2117 R. S., Sec. 179, 25 U.S. C.A., only attempts to protect the Indian Tribes in their tribal treaty rights and to keep persons not members of the tribe off of the lands belonging to the Indians.

Article 7 of the Treaty of 1855 with the Blackfeet Indians provides:

> "and the United States is hereby bound to protect said Indians against depredations and other unlawful acts which white men residing in or passing through their country may commit."

The Treaty with the Blackfeet of 1855 will be found in Kapplers Indian Affairs, Laws and Treaties, Vol. II, 2d Ed., pages 736 to 740.

Had it been the intent of the plaintiff to exercise jurisdiction over trespassing by animals belonging to the individual members of the Blackfeet nation, then the language of the treaty would have been so worded so as to have made that point clear; that this is the case will be found from an examination of the subsequent relations with the Blackfeet nation and other tribes included in the Treaty or agreement of 1885.

Article VI of the Treaty of 1869 with the Blackfeet nation and other tribes provides that heads of families, and other persons belonging to the tribe not heads of families, may select 320 acres if heads of families and 80 acres to all other for their exclusive use for farming. **"Exclusive"** is the word used. That intentionally leaves other lands to the Blackfeet nation **in common.**

These rights were not changed or modified by the agreement of 1887 with the Blackfeet nation. See Kappler Vol. II, pages 261-66.

The Treaty or agreement of 1895 expressly retained all rights to the Indians not therein or theretofore relinquished by treaty. Article V of the Treaty or agreement of 1895 expressly provided: 28 Stat 113-1

> "but during the existence of this agreement no allotments of lands in severalty shall be made to them but that the whole reservation shall continue to be held by these Indians **as a communal grazing tract upon which their herds may feed undisturbed."** (Emphasis ours.)

The foregoing clause bears out the contention of the

Appellants and shows that the Indian has never been deemed or considered a trespasser upon his own reservation and it further shows that it was the intent and purpose of the United States and the Indian Tribe to have these grazing lands used in common.

The contention is further supported by the Wheeler-Howard Act, Act of June 30, 1934, under the terms of which Indian Tribes were given a considerable measure of self governmnt after they elected to come under that act and adopted a charter and by-laws approved by the Secretary of the Interior, all of which was done by the Blackfeet Tribe, during the years of 1935-36. This is shown in the Transcript.

The record shows that the lands involved in this action were allotted to the members of the Blackfeet Tribe on or about the year 1918 when trust patents were finally issued. The said patents were issued under Article VI of An Act to Ratify and Confirm a Treaty Agreement with the Blackfeet and Other Tribes of Indians, approved May 1, 1888 (28 Stat. 113), and the Act of February 8, 1887, known as the General Allotment Act (24 Stat. 388), and the Indians acquired vested rights by virtue of said treaty and allotment act which vested rights the courts have uniformly held run with the land and the Federal Government has no right or authority to change or modify those rights. In a great number of cases already decided in the Federal courts among them Heckman v. United States, 224 U. S. 413, 32 S. Ct. Rep. 424 and Choate v. Trapp, 224 U. S. 665, 32 S. Ct.

Rep. 565, U. S. v. Glacier Co., 17 F. Supp. 411, 99 F. 2d. 733, Indian personal and property rights are protected.

Felix S. Cohen, a solicitor of the Interior Department, in a treatise on Indian rights in Federal courts published in 1940, declares that the Indian tribes or nations have sole jurisdiction of criminal offenses and says at page 152 in a reprint 24 Minnesota Law Review, 145-200:

> "So much consternation was created by the Supreme Court's decision in **Ex parte Crow Dog** that within two years Congress had enacted a law making it a federal crime for one Indian to murder another Indian on an Indian reservation. This law also prohibited manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. In later years notorious cases of robbery, incest, and assault with a dangerous weapon resulted in the piecemeal addition of these three offenses to the federal code of Indian crimes. There are thus, at the present time, ten major offenses for which federal jurisdiction has displaced tribal jurisdiction. Federal courts also have jurisdiction over the ordinary federal crimes applicable throughout the United States (such as counterfeiting, smuggling, and offenses relative to the mails), over violations of special laws for the protection of Indians, and over offenses committed by an Indian against a non-Indian or by a non-Indian against an Indian which fall within the special code of offenses for territory "within the exclusive jurisdiction of the United States. All offenses other than these remain subject to tribal law and custom and to tribal courts."

Crow Dog Case 1883, 109 U. S. 556, 3 S. Ct. 396, 27 L ed 1020.

Later in the same Treatise Solicitor Cohen states that since the adoption of the Wheeler-Howard Act of June 18, 1934, the Tribes that have elected to come under the said Act have adopted the "law and order problem" of their jurisdiction. He says at page 155:

> "The scope of the law and order problem which these tribes face is measured by the lacunae of federal law. There is no federal law to deal with simple assault committed by one Indian against another on an Indian Reservation, or with adultery, seduction, bigamy, kidnapping, receiving stolen goods, obtaining money under false pretenses, embezzlement, blackmail, libel, forgery, fraud, **trespass,** mayhem, bribery, killing of another's livestock, setting fire to grass or timber, use of false weights and measures, pollution of water supplies or disorderly conduct. The list is by no means complete."

Not until 1885 did Congress take steps to assume any jurisdiction over crimes committed on an Indian Reservation. Act of March 3rd, 1885, 23 Stat. at Large 385, Title 18 U.S.C. and U.S.C.A. Sec. 548. The latter Act covered only murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery and larceny on and within any reservation under the jurisdiction of the U. S. Trespasses by one Indian vs. another on his reservation has never been penalized by any U. S. Law.

The case of Worcester v. Georgia, 6 Pet. 543 and

ex parte Crow Dog, 109 U. S. 556, 3 S. Ct. 396, 27 L. Ed. are without doubt the controlling cases in the matter of Indian rights of self government and as Mr. Felix Cohen has ably set out in his Treatise, referred to above, all jurisdiction remains in the Indian Tribe except where expressly assumed by act of Congress. It is apparent that there was no right on the part of the United States to prosecute an action for trespass as between Indians of the same Tribe on their own Reservation, or as affects a member of the tribe while grazing animals on his own Reservation. This was true up to the time Mr. Cohen compiled his authorities in 1940; so it seems to be clear that the Court was without jurisdiction to penalize the Connollys or to entertain jurisdiction of the action. It is Mr. Cohen's opinion that since the enactment of the Wheeler-Howard Act the United States has no further jurisdiction in criminal matters not then in force, and that the election of the Indian Tribe to come under the Wheeler-Howard Act and the adoption of their law and Order Code ousts the United States from jurisdiction from those offenses generally described in the Law and Order Code.

Mr. Felix Cohen's conclusion on Indian rights are as follows:

> "The defense of Indian rights in the federal courts is a significant part of the pageant of American liberty. Across the panorama of the years pass judges who were tolerant enough to appreciate the grievances of an oppressed people and courageous enough to vindicate rights that Presidents, cabinet officers, army general and

reservation superintendents had violated. Chief Justice Marshall defending the rights of the Cherokee Nation which the hardened Indian fighter in the White House refused to enforce, Judge Dundy, issuing his writ of habeas corpus against General Cook, and the long procession of their fellow justices who have made Indian law —not the least of them Justices Grier, Sanborn, Lamar and Van Devanter—have played their part in the defense of American liberty. And across the decades, there march old Indian chiefs and warriers, forgotten criminals and peaceful victims of the white man's exploitation, each playing his part in the struggle to vindicate the human rights of a vanquished race. The murderer, Crow Dog, and the leader of exiles, Standing Bear,—John Ross, the Principal Chief of the Cherokee Nation in its trek to Indian Territory across the Trail of Tears, the Quinaielt Indians who insisted upon their right to fish on their own Reservation, the Choctaws and Chickasaws who insisted that the United States fulfill its promise that their allotted lands be exempt from taxation —all are part of this pageant of American liberty. For our democracy entrusts the task of maintaining its most precious liberties to those who are despised and oppressed by their fellow men."

3. **The striking of the allegations of the amended answer of Brian Connolly on motion of plaintiff was erroneous.**

Federal Rules of Procedure, rule 12, section (f) provides substantially, in so far as presently pertinent, that upon motion by a party the court may order redundant, immaterial, impertinent or scandalous matter stricken from any pleading. The rule makes it a discretionary matter with the court. In constru-

ing the rule Federal Courts have enunciated certain considerations guiding the exercise of such discretion.

Motions to strike are not regarded with favor and should be denied unless the allegations have no possible relation to the controversy or may prejudice the other party.

Hansen Packing Co. v. Armour & Co.
16 F. Supp. 784, at 787 (D. C. N. Y.),

Radtke Patents Corp. v. Taghbue Mfg. Co.
31 F. Supp. 226 (D. C. N. Y.).

Where it is doubtful whether under any contingency the matter may raise issues the motion should be denied.

Samuel Goldwyn Inc. v. U. S. Corp.,
35 F. Supp. 633, (D. C. N. Y.).

In Brinkey v. Lewis, 27 F. Supp. 313, at 314, the District Court (Pennsylvania) in denying a motion to strike certain matter from a complaint allegations characterizing the manner of an assault said, "The matter alleged cannot injure the defendant but will give him a more definite idea of the nature of the case to be presented."

By the treaty of Laramie the right of various Indian Tribes to occupy and exercise jurisdiction over certain land rights west of the Mississippi river was recognized. For the purpose of the present case, we need look no further than the treaty of October 17, 1855 (Vol. II "Indian Laws and Treaties," Kapler,

2d edition, p. 736), (11 Statutes at Large, 657, 662), and the executive order made in the year 1875 establishing the present boundaries of the Blackfeet Indian Reservation. (18 Stat. 28). Article 4 of the above treaty gives the right of exclusive control to the Blackfeet Indian Tribe to the area referred to and Article 4 defined the territory of the Blackfeet Nation and conferred "exclusive jurisdiction" upon the Blackfeet Tribe, to the territory defined. The territory of the Blackfeet Nation as described in the treaty embraced a much larger area than the present area although the treaty area included the present area of the Blackfeet Reservation.

Vol. II "Laws and Treaties," (Kapler), pp. 736-739 (2d edition).

The pertinent provision of the treaty reads:

> "The parties to this treaty agree and consent, that the tract of country lying within lines drawn from the Hell Gate or Medicine Rock Passes, in an easterly direction, to the nearest source of the Muscle Shell River, thence down said river to its mouth, thence down the channel of the Missouri River to the mouth of Milk River, thence due north to the forty-ninth parallel, thence due west on said parallel to the main range of the Rocky Mountains, and thence southerly along said range to the place of beginning, shall be the territory of the Blackfeet Nation, over which said nation shall exercise exclusive control, excepting as may be otherwise provided in this treaty."

That "grazing animals" was within the "exclusive

jurisdiction" of the tribe, under Article 4, is evidenced by the preceding Article 3 of the treaty which set aside a tract of land in which several enumerated tribes, inclusive of the Blackfeet Nation, were given common rights of "hunting, fishing, and gathering fruit, grazing animals, curing meats and dressing robes."

The executive order fixing the present boundaries of the Blackfeet Indian Reservation, did not in any manner restrict the grazing rights of the Blackfeet Indians upon and in the lands embraced within the executive order.

The constitution of the United States (Article VI) provides that the constitution and laws of the United States made in pursuance thereof and all treatise made, or which shall be made, under the authority of the United States shall be the Supreme Law of the land. Therefore by special mandate treaties made with the Blackfeet Indians constitute part of the supreme law of the land.

United States Revised Statutes, section 2079, 25 U. S. C. A. section 71, expressly recognizes the validity of the Indian treaties made prior to March 3, 1871.

The executive order above mentioned did not in any manner affect the title of the Indians to the lands referred to therein which were part of the lands in the treaty of 1855. The rule of law is well established that the Indian Title to right of occupancy is identical under treaty reservation and executive order reservation.

Spalding v. Chandler,
160 U. S. 394. 40 L. ed. 469,

McFadden v. Mountain etc. Co.
97 Fed. 670 (9th Circ.), at 673, (bottom of page),

Gibson v. Anderson,
131 Fed. 39, citing 97 Fed. 670.

Indian Treaties are interpreted most favorably to the Indian Tribe.

Choate v. Trapp,
224 U.S. 665, 667, 56 L. ed. 941, 946,

Gritts v. Fisher,
224 U.S. 640, 648, 56 L. ed. 928.

The right of self government except where restricted by treaty or act of Congress is in the Indian Tribe and because the treaty used the words "hunting grounds" such did not restrict the full use of the lands reserved by the Indians.

Worcester v. State of Georgia,
6 Peters 515, 8 L. ed. 483.

The right of Indians to the reservation land is not dependent on the treaty as a grant but rests upon their original title which is confirmed by the treaty and the rights of Indians to the uses therefore made of the land still subsists (Citing U. S. v. Winans, 198 U. S. 371, 49 L. ed. 1089). This was an action to quiet title of Indians of the Quinaielt Reservation in Washington to certain tide lands.

U. S. v. Romaine,
255 Fed. 253 (C. C. A. 9th).

The right of self government except as restricted by treaty or Act of Congress is in the Indian Tribe.

Worcester v. State of Georgia,
8 L. ed. 483, 6 Peters 515.

In the above case the court further held (Justice Marshall) that the use of the words "hunting grounds" would not restrict the full use of the land reserved by the Indians.

Treay provisions by the United States with the Indian Tribes are not to be interpreted narrowly but to be construed as Indians would understand them.

U. S. v. Shoshone Tribe,
82 L. ed. 1213, 304 U. S. 111,

U. S. ex. rel. Marks v, Brooks,
32 Fed. Supp. 422.

Doubtful provisions in treaty are to be interpreted in favor of the Indians.

U. S. v. Nez Perce County,
95 Fed. (2) 232.

Treaty may be superseded by subsequent act of Congress.

U. S. ex. rel. Mark v. Brooks Supra.

The power to abrogate a treaty is in the United States but it must be done by Act of Congress and **the intent to revoke the provisions of the treaty must be clear.**

Osage Tribe v. U. S.
66 Ct. Cls. 64, Certiorari
denied 279 U. S. 811, 73, L. ed. 971.

The act of March 3, 1871 abolishing the making of treaties with Indian Tribes expressly recognized the validity of prior treaties. Where the right to hunt and fish in lands, sold by an Indian Tribe are reserved, such are property rights, rather than rights of sovereignty.

Kennedy v. Becker,
241 U. S. 556, 60 L. ed. 1166.

In Mason v. Sams, 5 Fed. (2) 255, (District Judge Cushman writing the opinion) held that, under the rule that treaties with the Indians are to be construed in favor of the Indians, the provisions of the treaty of 1885 with the Tahelah Indians that a tract of land to be selected should be "reserved for the use and occupation of the Tribe and bands aforesaid **** and set apart for their exclusive use and no white man shall be permitted reside thereon without permission of the Tribe or of Superintendent of Indian Affairs or Indian Agent" gives to the individual Indian an exclusive right of fishing on the reservation.

The above decision further held that under such treaties made neither the Secretary of Interior nor Commissioner of Indian Affairs have any authority to make regulations under which particular locations on the Quinaielt Reservation are assigned to individuals with exclusive rights thereon or require that they pay royalty on fish caught and sold and all fish sold were required to be sold to licensed buyers under regulations made and it was also provided that violation of such regulations would entail the withdrawal

of fishing privileges for a specified period and also provided that fines might be assessed. The treaty also reserved the right of pasturage on the open unclaimed land and the right to take berries and roots and also hunt. The treaty did not expressly provide for the **exclusive right** to fish on the reservation.

The Court further held that the treaty gave the rights to the Indians of the tribe in common. That the Secretary of Interior **could not charge them royalty for the exercise of such right even though the proceeds were to go to the benefit and credit of the tribe and that neither the Secretary of Interior or the Commissioner of Indian Affairs was vested with any discretion with respect thereto.**

See also:

U. S. v. Winans,
198 U. S. 371, 49 L. ed. 1089.

The Act of June 2, 1924, 45 Stat. 253 c. 233, in granting citizenship to the Indians expressly preserved the rights of the Indians to tribal or other property.

In the case of U. S. v. Winans, supra, the Court, in sustaining the common right of fishing in the individual Indians held that subsequent admission of the State of Washington to the Union and the issuance of patents bordering the stream by the United States did not defeat the rights of the Indians. The Court held that a treaty with an Indian Tribe is not a grant of rights but a limitation of rights and all rights not expressly limited are reserved to the Indian Tribe, as interpretation of the treaty is to be in favor of the In-

dians and in the sense the unlettered Indian understand the language.

In U. S. v. Stotts, 49 Fed. (2) 619, (1930), it was held that the rights to the land reserved by the treaty were common rights and allotment of a part of the reserved lands did not destroy such common rights in the enjoyment of the unallotted lands; that the right of occupancy is not predicted upon a grant by the United States but under the reserved aboriginal right which the Indians inherently held in the land segregated and withheld from the land ceded by the Indians under the treaty.

Treaties must be construed not according to the technical meaning of its words to learned lawyers but in the sense in which they would naturally be understood by the Indians, and doubtful clauses in the treaty are resolved in a non-technical way as the Indian would have understood the language.

Jones v. Meehan,
175 U. S. 1, 44 L. ed. 49, 54.

Brian Connolly and Daniel Connolly by virtue of their treaty rights could not be held trespassers where the allotted or tribal lands were unfenced. Therefore allegations of their treaty rights and that the plaintiff and the Blackfeet Tribe had so interpreted the treaty since its adoption was pertinent and material as showing the understanding of both the plaintiff and the Blackfeet Tribe of what was intended by the treaty (R. 29, 30), and the trial court erred in striking such allegations (R. 33, 34). We have found no

statute which has taken away the above rights as to unfenced lands.

The Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, 25 U. S. C. 467, authorizing tribes to organize and incorporate does not abrogate tribal rights. In fact, it enlarges certain of such rights. Among other things, the act provides "In addition to all powers now vested in any Indian tribe by existing law the constitution adopted by such tribe shall also vest in such tribe or tribal council the following rights and powers *** to prevent the sale, disposition, lease, or encumbrance of tribal lands", and under section 17 of the same act it is provided that a charter of incorporation to be issued to any tribe may convey to the incorporated tribe the power to own, hold, manage, operate and dispose of real and personal property including the power to purchase restricted Indian lands and issue in exchange interests in corporate property but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation.

By Section 6 of the same act the Secretary of the Interior is directed to make rules and regulations for operation and management of Indians forestry units, **and to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of the range, and to protect the range from deterioration, prevent soil erosion, to assure full utilization of the range,** but does not authorize him to enact legislation as to trespass and provide punishment by way

of a penalty.

The corporate charter of the tribe provides "no property rights of the Blackfeet Tribe, as heretofore constituted shall be in any way impaired by anything contained in this charter." (Subd. 7, R. p. 309), and the tribal constitution confers power to legislate upon the tribe (R. 300), and abrogates all rules and regulations of the Interior department in conflict therewith (R. 301).

It is clear that this grazing right of individuals on lands of the reservation is not abridged.

Nowhere in the law do we find any United States statute which provides that the straying of Indian cattle upon adjoining unfenced land constitutes an actionable respass. Therefore, we must look to the tribal customs and laws for the rules controlling in such cases, which will be the subject next considered.

The trial court struck from the amended answer allegations pertaining to custom of the tribe to permit livestock to roam and graze upon unfenced areas and recognition of such right in tribal members (R. 31, 33, 34)).

The general misconception of the extent of the rights of Indian Tribes is stated in Handbook of Federal Indian Laws "legal powers of Indian Tribes measured by the decisions of the courts are far more extensive than the powers which most Indian tribes have been permitted by energetic officers to exercise" (pg. 125). In the same publication it is stated that the laws and customs of the tribe in matters of

contract and property generally may be administered in the tribunals of the tribe and such laws and customs will be recognized by the court of the state or nation in cases coming before the courts (page 143).

See also Title 25 Sec. 218 U. S. C. which exempts from federal punishment persons "having been punished by the local law of the tribe."

The Department of the Interior, after the Wheeler-Howard Act of Congress was passed, had its solicitor, Nathan Margold, give an extended opinion for the guidance of that department on the effect of such act on Indian Tribes who organized under the act. The opinion was approved by Assistant Secretary of the Interior Chapman. This opinion embracing fifty three pages and containing a comprehensive consideration of Indian law appears in Volume 55, Decisions of the Department of the Interior, pages 14 to 67. The following are some of the conclusions of the solicitor based upon the statutes and decisions as appear from the syllabus:

> "Conquest has brought the Indian tribes under the control of Congress, but except as Congress has expressly restricted or limited the internal powers of sovereignty vested in the Indian tribes such powers are still vested in the respective tribes and may be exercised by their duly constituted organs of government.
>
> The acts of Congress which appear to limit the powers of an Indian tribe are not to be unduly extended by doubtful inference.
>
> Attempts of administrative officials to interfere in the exercise by the Indian tribes of their

> powers of self-government, or to supplant tribal authorities in the administration of these powers, have not terminated or impaired the legal rights and powers vested in the various Indian tribes."

The long established custom of the Blackfeet tribe with respect to what constituted a trespass as between members of the tribe with respect to livestock appears in the form of a written law in Section 15 of Chapter 5 of the law and order code of the Blackfeet Tribe (R. 336), which reads as follows:

> "Any Indian who shall go upon or pass over any cultivated or enclosed lands of another person and shall refuse to go immediately therefrom on the request of the owner or occupant thereof, or who shall wilfully and knowingly allow any livestock to occupy or graze on the cultivated or enclosed lands, shall be deemed guilty of an offense and upon conviction shall be punished by a fine not to exceed $5 and the cost of the Court, in addition to any award of damages for the benefit of the injured party."

This section requires a willful and knowing allowance by an Indian of livestock to occupy or graze on the **cultivated or enclosed** lands of another person. Since the defendants did not do the above prohibited acts on cultivated or **enclosed lands** they are not chargeable as trespassers.

The trial court was clearly in error in sustaining the motion to strike and in denying Brian Connolly permission to testify to the custom (R. 263), as such evidence would show, to aid in the interpretation of the written law, what the established practice had been in the past with reference to Indian livestock.

The matters in this division of the brief are pertinent to appellants' above specifications of error numbered 8, 9, 10 and 11.

4. **Restriction of redirect examination of witness.**

On cross examination witness Brian Connolly, a member of such council, was interrogated by counsel for plaintiff relative to a purported resolution of the Blackfeet Indian Tribal Council (R. 264-269), and a certified copy of such resolution was received in evidence as Plaintiff's Exhibit No. 11 (R. 265-268). Upon redirect examination of this witness, for the purpose of showing that the resolution had never been adopted and to definitely settle the matter a resolution was adopted repealing the resolution, the witness was asked, in substance, whether the question of the passage of such resolution had been a subject of discussion with the council. Plaintiff objected that the resolution spoke for itself and was the best evidence (R. 287). Counsel for defendants stated the purpose of the examination (R. 287), and the trial court sustained the objection as going into the proceedings of the council (R. 287).

In brief, the plaintiff by introduction of the copy of the resolution attempted to leave the impression that the resolution itself established a trespass by defendants under the evidence in the cause. The defendants sought to show that it did not apply to a case of this character and was not so intended and that to obviate the question it was expressly repealed. The learned trial judge evidently believed that the resolu-

tion introduced was a finality and could not be explained nor the intent of the tribal council could not be made the subject of an inquiry. The resolution uses the term "free grazing." Under the facts the defendants were not what might be termed free grazers as they owned their own land partly, and had lease on other land far in excess of the amount of land required for the grazing of the livestock owned or in their possession. Therefore, the redirect examination properly sought to show the inapplicability of the resolution's free grazing" clause and that same was not intended to apply to persons situated as the defendants and to obviate any further question of being construed as being applicable in such a situation the resolution was repealed.

The resolution of the tribal council in as much as it is an act of a corporate body, is similar to an ordinance of a municipal corporation.

Parol evidence is admissible to explain an ambiguity in a municipal ordinance.

Village of Donovan v. Donovan.
86 N. E. 575 (Sup. Ct. Illinois).

The minutes, if any, of the meeting of the council were not in evidence. However, although prima facie evidence of corporate acts the minutes are not conclusive evidence and parol evidence is admissible to show what actually took place.

Cox v. First National Bank,
52 Pac. (2) 524, 10 Cal. App. (2) 302,
Franciscan Hotel Co. v. Albuquerque Hotel Co.,
24 Pac. (2) 718, 37 N. M. 456.

The trial court consequently was in error as indicated in specification of error No. 12 above.

5. **Denial of motions for a new trial.**

The questions of fact and law already considered were presented to the District Court by the separate motions of the defendants for a new trial (R. 59-65, 67-70), and we respectfully refer the Court to what has been heretofore said.

Among the grounds assigned by Brian Connolly in his motion were "accident and surprise" which ordinary prudence could not have guarded against (R. 60), and in support of this assignment his affidavit (R. 72, 73) recites:

> "That prior to the time the above entitled action was set down for trial and at the time when he retained E. J. McCabe of Great Falls, Montana to act as his attorney in said action, he inquired of his said attorneys as to whether he could have a trial of said cause by a jury and was informed by his said attorney at that time that the above entitled action was an equitable action for injunctive relief with the claim for compensatory damages as relief incidental to the main relief sought by way of injunction, and that said action was of a character known and referred to generally as an equitable action in which defendants were not entitled to a jury trial, and that since no penalty or forfeiture by way of punishment was sought in the action that he could not obtain a separation of causes of action and a trial by jury. That affiant verily believed and verily believes the statement made by his attorney and that in reliance upon said statement affiant did not request that said action or any issue therein be tried by a jury, and that had affiant believed

that the plaintiff would seek to recover a money penalty or a money forfeiture in said action by way of punishment of this defendant, that affiant would have requested the issue of punishment to be submitted to a jury in said cause."

It will be observed from a reading of the complaint that the remedy sought is an equitable remedy of injunction and incidental damages. No actual damages were proven at the trial. Injunctive or equitable relief was granted. No intimation is set forth in the complaint that a penalty of forfeiture would be sought as against the defendants. On examining the complaint and its allegations and prayer for relief, the attorney for Brian Connolly informed him that he was not entitled to a jury trial. Had there been any intimation in the pleadings that a forfeiture would be sought by way of punishment, counsel for said defendant could then have rightfully informed Mr. Connolly that he would be entitled to have the forfeiture issue submitted to a jury. Therefore, in the present case, independent of whether or not Mr. Connolly would have waived a jury under such advice, the objection is that he was misled by the complaint, whereby he was not given an opportunity to decide whether he would or would not have the penalty or forfeiture issue submitted to a jury. Assuming for argument only that plaintiff would be entitled in this proceeding to join an equitable cause of action with an action for a forefeiture, which in its nature is an action at law, and failed to separately state and number, same would be subject to a motion to have plaintiff separ-

ately state and number his separate causes of action. There is nothing in the complaint to intimate that there are separate causes of action, one for equitable relief and one for relief at law by recovery of a penalty (under the old practice) and therefore, a party pleading in the manner in which the complaint pleads the facts could, by such subterfuge, defeat a defendant's remedy by motion to separately state and number causes of action, and defeat his right to a jury trial.

The trial court erred in denying the motions for a new trial.

6. **Grazing regulations.**

During the trial of this cause below reference was frequently made by plaintiff's counsel to grazing regulations violated (R. 270-272) as establishing actionable trespass. The grazing regulations appear in the record pages 231 to 243, inclusive. At page 238 of the record certain things are stated as constituting a trespass. None of the provisions is made applicable to a case where a permittee's stock following a natural characteristic strays upon unfenced adjoining land as is presented by the evidence at bar.

CONCLUSION

It is respectfully submitted that the entire record discloses **a complete failure of proof** of the material allegations of the complaint and that the judgment of the District Court in the cause at bar should be reversed.

E. J. McCabe

S. J. Rigney

Attorneys for Apellants Brian Connolly and Daniel Connolly.